Supreme Court, U.S.
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No. 85-112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LITTLE CROW MILLING CO., INC.,
MIDSTATE MILLS, INC.,
and THE PILLSBURY COMPANY,
Petitioners,

v.

BALTIMORE & OHIO RAILROAD CO.,
CHESAPEAKE & OHIO RAILWAY CO.,
CHICAGO SOUTH SHORE & SOUTH BEND RAILROAD CO.,
CONSOLIDATED RAIL CORP.,
ILLINOIS TERMINAL RAILROAD CO.,
NORFOLK & WESTERN RAILWAY CO.,
and SOUTHERN RAILWAY CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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CERTAIN RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Seventh Circuit err in ruling that, under *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922), an antitrust treble damage action may not be based on railroad rates that were initially authorized and formally approved by the Interstate Commerce Commission, where the agency later ordered those rates cancelled prospectively, but refused to declare them void *ab initio* or to award damages?

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CERTAIN RESPONDENTS' JOINT BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

1. *Introduction*

In these cases, Petitioners are shippers seeking treble damages under the antitrust laws against the Respondent railroads based on their rates for wheat and wheat products that the Interstate Commerce Commission author-

ized to be charged between 1979 and 1982.[1] These actions were filed following proceedings before the ICC in which the agency, prompted by shipper protests, conducted a full investigation of the wheat rates at issue here and ruled that those rates were lawful under the Interstate Commerce Act. The Commission subsequently ordered cancellation of the rates on procedural grounds, but did so only prospectively, and explicitly rejected the shippers' requests to nullify the prior approval and to award damages. The shippers chose not to appeal the ICC's ruling, but some of them initiated this collateral attack under the antitrust laws. The Seventh Circuit unanimously affirmed the district court's dismissal of the complaints in light of *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922) and the ICC's approval of the rates, and this petition ensued.

2. *The ICC Proceedings*

The wheat rates in issue here were submitted to the ICC in January 1979 to comply with a Commission order finding the previous rate structure to be unjustly discriminatory.[2] The Respondent railroads originally sought to eliminate the discrimination with a new tariff termed "Plan A," but withdrew that proposal in the face of shipper protests and an ICC order suspending its effec-

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[1] Petitioner The Pillsbury Co. omits mention of the fact that it has settled with the Respondents on whose behalf this brief is filed.

The information required by Rule 28.1 is set forth in the Appendix.

[2] The procedural history of the nearly decade-old dispute between shippers and railroads concerning wheat rates is recounted in two ICC opinions, both entitled "*Transit On Wheat Between Reshipping Point And Destination.*" These will be cited as "*Transit on Wheat II*," 362 I.C.C. 529 (1980) and "*Transit on Wheat IV*," 365 I.C.C. 890 (1982) for the sake of consistency with the Petition and the opinions below.

tive date.[3] To replace Plan A, the ICC authorized the railroads to file "Plan B," an alternative rate structure.[4] A group of wheat shippers (including certain of the Petitioners and the Chicago Board of Trade on behalf of its 1400 members in the grain industry) challenged Plan B before the ICC as both unreasonable and discriminatory, and requested suspension of the rates pending investigation. The Commission opened an investigation but denied the suspension request, allowing the Plan B rates to become effective on March 17, 1979.[5]

After a formal proceeding over the course of nine months, involving evidentiary hearings and arguments, the ICC approved the Plan B rates. *Transit on Wheat II*, 362 I.C.C. at 564. The Commission first rejected the shippers' evidence on the issue of rate reasonableness, and then turned to the "major issue" of claimed unjust discrimination. *Id.* at 555. After analyzing the allegations that the Plan B rates illegally discriminated against certain product classes and geographic regions, the ICC concluded that the Plan B tariffs were lawful. *Id.* at 555-58. Finally, the Commission refused to set aside the rates based on the shippers' argument that the railroads had failed to follow rate bureau notice procedures in announcing the Plan B proposal.[6]

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[3] *Transit on Wheat II*, 362 I.C.C. at 530-31 (1980).

[4] *Id.* at 531. The principal feature of Plan B was the elimination of "transit privileges," which allow the cargo to be unloaded for storage or processing at an interim point without losing the benefit of the lower rate.

[5] *Transit on Wheat IV*, 365 I.C.C. at 891-92.

[6] Although the ICC held that notice through the rate bureau was technically required, it excused the procedural infraction because (1) "the wording [of the rate bureau procedures] is vague [and] received our interim approval," and (2) the shippers had substantial advance notice of the rate proposal apart from the rate bureau procedures. *Transit on Wheat II*, 362 I.C.C. at 562-63.

On appeal, the Seventh Circuit stated that "ICC approval itself shelters the joint rates from private suit under the antitrust laws," citing *Keogh*.[7] However, the appellate court remanded the case for reconsideration of the rate bureau procedure issue. The ICC then reopened that question and, solely because of the technical violation, ordered the Plan B tariff cancelled prospectively. *Transit on Wheat IV*, 365 I.C.C. at 901.

In so ruling, the ICC considered and rejected the shippers' requests for retroactive nullification of the rates and for an award of damages. *Id.* at 898-901. The Commission held that the shippers had not demonstrated any equitable reason why the rates should be deemed void *ab initio*, "nor ha[d] they established actual injury flowing from the carriers' unlawful tariff publication." *Id.* at 900. In addition, the ICC referred to the fact that the rates were "lawful under the substantive provisions of the [A]ct." *Id.* at 899.

None of the shippers appealed this ICC decision. Rather, some initiated the instant antitrust complaints for treble damages based on their payment of the Plan B rates during the period those rates were approved by the ICC.

3. *The Decisions Below*

Against this backdrop, the district court granted the Respondents' motion for summary judgment. *In re Wheat Rail Freight Rate Antitrust Litigation*, 579 F. Supp. 517 (N.D. Ill. 1984) (Petition Appendix ("Pet. App.") at 22a). Judge Marshall ruled that this case was controlled by *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922), and its progeny, in which this Court barred shipper antitrust damage claims based on rates duly filed with and regulated by the ICC. The court dis-

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[7] *Board of Trade of Chicago v. ICC*, 646 F.2d 1187, 1193 (7th Cir. 1981).

missed Petitioners' complaints under *Keogh* because a damage award based on rates "the ICC had explicitly approved would without question interfere with the policy of the Interstate Commerce Act," and would destroy the carriers' ability to rely on ICC determinations. 579 F. Supp. at 536-37 (Pet. App. at 54a-55a).[8]

A unanimous panel of the United States Court of Appeals for the Seventh Circuit affirmed, holding that "the reasoning and conclusions of the Supreme Court in *Keogh* are still valid and applicable today." *In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305, 1316 (7th Cir. 1985) (Pet. App. at 20a). The appellate court analyzed and rejected the shippers' contention, repeated here, that the 1976 amendments to the Interstate Commerce Act undermined *Keogh*'s holding. The court found Petitioners' argument that the ICC was divested of regulatory authority over wheat rates to be inconsistent with the "history of this very case," which "illustrates the extent to which the railroads do not operate in a purely competitive market, but rather are subject to the persistent overview of the ICC." *Id.* at 1313 (Pet. App. at 15a). To the contrary, the court ruled that Congress left the ICC with "extensive" regulatory powers, *id.*, and therefore held that the underpinnings of *Keogh* had not been vitiated. *Id.* at 1316 (Pet. App. at 20a).[9]

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[8] The district court was also concerned that determining antitrust damages would require "substantial speculation about what the rate would have been absent the alleged violation [and] whether the ICC would have approved the hypothetical rate." 579 F. Supp. at 535 (Pet. App. at 52a).

[9] The Seventh Circuit dealt with the other argument raised here, the impact of this Court's recent opinion in *ICC v. American Trucking Associations*, 104 S. Ct. 2458 (1984), by noting that *ATA* stands for the proposition that the ICC, not the antitrust courts, has "primary administrative responsibility" for ensuring compliance with rate bureau procedures. 759 F.2d at 1311 (Pet. App. at 11a-12a).

The Seventh Circuit also was concerned that awarding antitrust damages under the specific circumstances of this case would undermine the goals of certainty and fairness, which lie at the heart of the Interstate Commerce Act:

> In this case, the ICC initially had approved Plan B and subsequently refused to declare the rates void *ab initio*. Once the ICC had approved the rates, the carriers could charge only that rate and no other. To subject the carriers to retroactive antitrust liability for rates later declared unlawful would place carriers in a position of "great uncertainty." Carriers would never be able to rely on ICC approval of rates until all appeals on initial ICC decisions had been decided. Then, if such appeals resulted in the rates being declared unlawful, the carriers would be forced to pay treble damages even though the rates had been initially approved and they had been required to charge only those rates. We do not think it was the goal of the ICA to trap carriers into such retroactive antitrust liability for engaging in conduct required by the ICA. The imposition of antitrust liability for this conduct would only frustrate the goal of the ICA.

759 F.2d at 1315 (Pet. App. at 18a) (citation omitted).

REASONS FOR DENYING THE PETITION

In these private antitrust actions, the instrument of alleged damage is rail rates that at all relevant times the ICC had authorized to be charged. The rates Petitioners paid were embodied in a published tariff that the ICC first authorized to be filed, then investigated formally, and finally approved as lawful under the Interstate Commerce Act. When the Commission later ordered cancellation of those rates because of a procedural defect, it explicitly made that cancellation *prospective only*, and refused to nullify its prior approval, leaving Plan B as the only lawful rates in effect during the relevant period to control the provision of transportation by Re-

spondents to Petitioners. After years of litigation before the ICC, Petitioners here attempt to escape the Commission's refusal to order retroactive nullification and damages by seeking antitrust damages based on the very rates the expert agency concluded should not be the basis for a damage award.

This Court held over sixty years ago in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922), that Congress intended the rate filed with the ICC to be "*for all purposes*, the legal rate," *id.* at 163 (emphasis added), and that shippers and carriers alike should be able to rely on the availability of the filed rate as the congressionally-sanctioned instrument for safeguarding against discrimination.[10] The Court therefore ruled that shipper claims for damages based on filed rates must be resolved by the ICC under the unique standards of the Interstate Commerce Act, not by federal courts applying the antitrust laws. By this means, conflicts between court and agency jurisdiction, such as the ones in *Keogh* and here, would be avoided. The *Keogh* doctrine was reaffirmed in *Georgia v. Pennsylvania Railroad*, 324 U.S. 439 (1945), and since that time has been applied consistently by the lower courts in cases such as this one.[11]

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[10] *See also Burlington Northern Inc. v. United States*, 459 U.S. 131, 140 (1982) (a court may not enter an injunctive order that operates to fix ICC-regulated rates).

[11] *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347 (2d Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3019 (U.S. July 23, 1985) (No. 85-21); *Minsky v. Auto Driveaway*, 757 F.2d 718 (7th Cir.), *cert. denied*, 105 S. Ct. 435 (1984); *In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305 (7th Cir. 1985); *Board of Trade of Chicago v. ICC*, 646 F.2d 1187 (7th Cir. 1981); *In re Lower Lake Erie Iron Ore Antitrust Litigation*, MDL 587, slip op. (E.D. Pa. June 5, 1985); *Asbury Graphite, Inc. v. Dehyco Co.*, 1981-1 Trade Cas. (CCH) ¶ 63,980 (N.D. Cal. 1980); *Monticello Heights, Inc. v. Morgan Drive Away, Inc.*, 1974-2 Trade Cas. (CCH) ¶ 75,282 (S.D.N.Y. 1974).

This Court has frequently cited *Keogh* with approval,[12] and just last term declined to reconsider the doctrine.[13]

That the danger of conflict addressed in *Keogh* is real, not theoretical, is manifest on the facts of this case. As the extensive proceedings before the ICC demonstrate, not a step was taken to charge the Plan B rates without ICC review and authorization. Approval of the rates was only given after consideration of the views of Petitioners and of the statutory standards in the Interstate Commerce Act. The ICC expressly declined to nullify the Plan B rates and to allow them to become the basis for a damage award, an example of agency discretion that this Court only last term cited with approval. *ICC v. American Trucking Associations*, 104 S. Ct. 2458, 2468 n.13 (1984) (*"ATA"*). To now permit Petitioners to use the courts to seek antitrust damages based upon precisely the same facts that the expert agency rejected as grounds for damages would render the kind of discretionary decision approved in *ATA* an utter nullity.

1. ***The 4R Act did not eliminate the ICC's authority over rail rates, as the history of post-1976 shipper challenges to wheat rates demonstrates.***

Petitioners' lead argument is that the issue of statutory interpretation settled in *Keogh* and *Georgia* should be reviewed in light of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90

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[12] *See, e.g., McLain v. Real Estate Board, Inc.*, 444 U.S. 232, 243 (1980); *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 300 n.12 (1973); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260 (1972); *United States v. Philadelphia National Bank*, 374 U.S. 321, 351 n.29 (1963); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 310 (1963); *United States v. RCA*, 358 U.S. 334, 347, 348 (1959); *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 483, 485 (1932).

[13] *Minsky v. Auto Driveaway*, 757 F.2d 718 (7th Cir.), *cert. denied*, 105 S. Ct. 435 (1984).

Stat. 31 (1976) ("4R Act"). The Petition does not cite any legislative history suggesting a Congressional intent to overrule this Court's decisions, but rather asserts more generally that the *Keogh/Georgia* holdings are inconsistent with the "deregulation" of rates by that Act. This position is not only surprising in light of the history of post-1976 ICC protests by wheat shippers and extensive ICC review of the Plan B rates, it is mistaken.

One need not look beyond the procedural history of the Plan B rates to see, as the Seventh Circuit held, that the ICC's regulation of rail rates remains "extensive." 759 F.2d at 1313 (Pet. App. at 15a). After the 4R Act, the ICC still has authority to declare rates unreasonably high,[14] and the statutory prohibitions against unjust discrimination—which Petitioners do not refer to even once—continue undiminished.[15] It was these regulatory powers that the shippers invoked before the ICC in protesting the Plan B rates in 1979.

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[14] Petitioners wrongly intimate that the ICC has *no* role in regulating rate reasonableness after the 4R Act. Petition at 8. In fact, the 4R Act leaves intact the ICC's power to prescribe maximum reasonable rates where it finds an absence of effective competition, or "market dominance." 4R Act sec. 202(b), 90 Stat. at 35. In other circumstances, as here, the Commission is authorized to find that competitive forces "insure[] that rates do not exceed a just and reasonable level." S. Rep. No. 499, 94th Cong., 1st Sess. 46 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 14, 61. In either case, it is the ICC in which Congress has vested the authority to decide how "a just and reasonable [rate] level" can be achieved, and the resulting rate, like the rate in *Keogh*, remains "unless and until suspended or set aside . . . for all purposes, the legal rate." 260 U.S. at 163.

[15] The statute itself and its legislative history confirm that the new procedure for ICC review of rate reasonableness does not affect the other standards for ICC determinations of rate lawfulness, including the anti-discrimination provisions. 4R Act sec. 202(f), 90 Stat. at 39; S. Rep. No. 595, 94th Cong., 2d Sess. 148 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 148, 163.

Indeed, the unjust rate discrimination prong of ICC authority, which was a "major issue" put before the Commission with regard to Plan B, is the key underpinning of *Keogh*. As this Court has recognized repeatedly in light of legislative history dating back to 1887, rate discrimination was "the principal thing aimed at" by Congress in creating the scheme of shipper rights and remedies in the Interstate Commerce Act. *Houston, East & West Texas Railway v. United States*, 234 U.S. 342, 356 (1914).[16] Moreover, the ICC's jurisdiction over discriminatory rates was central to the rationale of the *Keogh/Georgia* decisions, as the Court held in *Keogh* (prevention of unjust discrimination is "the paramount purpose of Congress," 260 U.S. at 163), and demonstrated in *Georgia*, where the allegation before the ICC and this Court was the discriminatory impact of rail rates. 324 U.S. at 453. Thus, the Seventh Circuit was correct in holding that the 4R Act amendments provide no plausible basis for avoiding the *Keogh* doctrine on the facts of this case. 759 F.2d at 1311-12 (Pet. App. at 10a-12a).

2. *Under the* ATA *opinion, rates approved by the ICC and never nullified may not form the basis for an antitrust damage action.*

Petitioners also contend that recent dictum in *ICC v. American Trucking Associations*, 104 S. Ct. 2458 (1984), regarding rates found to be "unlawful" by the ICC has applicability here. Petition at 10. As Petitioners acknowledge, that case is not directly relevant, for it dealt solely with the ICC remedy of tariff nullification under the Motor Carrier Act of 1980, and never men-

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[16] *See also American Trucking Associations v. Atchison, Topeka & Santa Fe Railway*, 387 U.S. 397, 406 (1967) (it was "secret rebates, special rates . . . and discriminations . . . that led to enactment of the Interstate Commerce Act in 1887").

tioned *Keogh*.[17] Nonetheless, Petitioners try to fit the ICC's prospective cancellation of the Plan B rates within language in *ATA* that they contend suggests that antitrust damage liability may arise where the ICC has disapproved tariffs as "unlawful." Petition at 10-11.

The argument is wide of the mark for, contrary to Petitioners' assertions, the ICC did not find that the Plan B rates were "unlawful" during the time those rates were charged.[18] The Commission initially authorized the rates, and concluded its full investigation in

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[17] As to Petitioners' reliance on *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), Petition at 9-10, both the Seventh Circuit below and the Second Circuit in *Square D* held that that case cannot be read to overrule *Keogh*, and is therefore irrelevant. *Carnation* never mentioned *Keogh*, and arose under the Shipping Act, an entirely different regulatory scheme. *See* 760 F.2d at 1361-63.

[18] Not only is the *ATA dictum* relied on by Petitioners devoid of any definitive statement regarding antitrust damages, but it refers to circumstances not present here, namely where the ICC finds that a filed rate is *substantively* unlawful under the reasonableness or non-discrimination provisions of the Interstate Commerce Act. The relevant statement in *ATA* is: "[w]henever the Commission finds an effective tariff unlawful, injured parties can recover both damages under § 11705(b)(3) and *whatever* additional amounts the antitrust laws allow." 104 S. Ct. at 2462 (emphasis added). That the Court was speaking of *substantive* unlawfulness is clear (1) from the Court's citation to 49 U.S.C. § 11705(b)(3) (1982), which provides for damages to the extent a rate is unreasonable or discriminatory (*see id.* at 2463 n.5), and (2) by contrast with the preceding sentence of the opinion, in which the Court refers to mere procedural deficiencies. Here, of course, the ICC found the Plan B rates to be substantively lawful, as they were neither unreasonable nor unjustly discriminatory.

The *Square D* opinion is not to the contrary, for the Second Circuit's reference to "unlawful" tariffs must be read to mean no more or less than the *ATA* opinion on which it relies. 760 F.2d at 1364. Moreover, it is bizarre to suggest a conflict between circuits when both applied *Keogh* where the rates filed in an effective tariff were the *only* lawful rates during the relevant time period.

1980 with a ruling that the rates were substantively lawful. When the ICC ruled in 1982 on procedural grounds that the railroads should not be permitted to charge the Plan B rates in the future, it appropriately ordered prospective cancellation.

At the same time, the Commission explicitly refused to nullify its prior approval of those rates or to award damages to the shippers, thereby confirming that the Plan B rates remained the only lawful rates during the time period for which Petitioners seek treble damages. That decision to forbear from imposing retroactive damage liability was acknowledged by this Court in *ATA* as an example of appropriately-exercised agency discretion. 104 S. Ct. at 2468 n.13. This Petition, by seeking antitrust damages on the very same facts the Commission rejected as a basis for a damage award, turns *ATA* on its head. Such efforts to undermine consistent administration of the Interstate Commerce Act are precisely what this Court in *Keogh* and *Georgia* would not countenance.[19]

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[19] Petitioners' other argument, that the Seventh Circuit believed that collective ratemaking is compelled by statute, Petition at 12-13, is both incorrect and irrelevant. First, the lower court's opinion made clear that it did not hold such a belief, as it referred to the fact that carriers "may" enter into collective ratemaking agreements and "could" set rates jointly. 759 F.2d at 1307 (Pet. App. at 2a). Second, it cannot be seriously contended that the section of the opinion Petitioners quote is essential to the court's determination, coming as it does in the concluding paragraphs *after* the court's lengthy analysis of *Keogh* and the 4R Act.

CONCLUSION

The *Keogh/Georgia* doctrine, which has been applied consistently by the courts for over sixty years, squarely controls this case. Petitioners cannot avoid that doctrine, given that the ICC not only retains, but exercised, extensive jurisdiction over the rail rates in issue here. The courts below were correct in dismissing this attempt to re-litigate a dispute fairly and finally settled under the Interstate Commerce Act. The Petition raises no legal issue of importance, and therefore should be denied.

Respectfully submitted,

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August 19, 1985

APPENDIX

The following information is provided pursuant to Supreme Court Rule 28.1:

1. The Baltimore and Ohio Railroad Company is a subsidiary of the Chesapeake and Ohio Railway Company.

2. The Chesapeake and Ohio Railway Company is a subsidiary of CSX Corporation.

3. The Chesapeake and Ohio Railway Company and the Baltimore and Ohio Railroad Company are affiliated with the Richmond, Fredericksburg and Potomac Railroad, the Seaboard System Railroad, the Texas Gas Transmission Company, and the Carolina, Clinchfield and Ohio Railway Company.

4. The Chicago South Shore and South Bend Railroad Company is a subsidiary of Venango River Corporation.

5. Consolidated Rail Corporation has the following non-wholly-owned subsidiaries: Calumet Western Railway Company and Indiana Harbor Belt Railroad Company. In addition, Consolidated Rail Corporation is affiliated with the following: Akron & Barberton Belt Railroad Company, Albany Port Railroad Corporation, Belt Railway Company of Chicago, Chicago & Western Indiana Railway Company, Fruit Growers Express Company, Lakefront Dock & Railroad Terminal Company, Monongahela Railway Company, Nicholas, Fayette & Greenbrier Railroad Company, Peoria & Pekin Union Railway Company, Pittsburgh, Chartiers & Youghiogheny Railway Company, and Trailer Train Company.